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James L. Highsaw Jr.

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# The Need For Re-Evaluation of Labor Legislation

By JAMES L. HIGHSAW, JR.†

## I. APPLICABLE LEGISLATION—THE RAILWAY LABOR ACT

ANY DISCUSSION of air transport labor legislation must recognize that the rapidly growing character of the industry and its ever changing technology has had a substantial impact upon its labor relations. The reports of all certified-route air carriers to the Civil Aeronautics Board, the Federal agency charged with their economic regulation pursuant to the Federal Aviation Act,<sup>1</sup> show that for the twelve-month period ending 30 September 1968 these air carriers transported approximately 158 million revenue passengers some 110 billion revenue passenger-miles. These figures do not include the additional millions of passengers transported by supplemental air carriers or air taxi companies operating small equipment. By contrast, in 1926, the earliest available date for statistics, all air carriers originated approximately 6,000 revenue passengers resulting in 1.27 million revenue passenger-miles.<sup>2</sup> This enormous increase in the airline industry's operations has been reflected in the number of employees utilized by air carriers. In 1928, the first available year for statistics, air carriers employed 1,496 employees. In September, 1968, all certified air carriers employed in excess of 290,000 employees.

During 1926, when the airline industry was just beginning, the Railway Labor Act was enacted as the culmination of many prior regulatory statutes.<sup>3</sup> Its purpose was to regulate the labor relations of carriers by railroad, express companies and sleeping car companies subject to the Interstate Commerce Act.<sup>4</sup> Another decade passed before the growth of the airline industry brought forth legislation to regulate its labor relations. At that time only the safety aspects of airline operations were subject to direct governmental regulation, although additional economic regulation was inherent in the airmail contract program. Another ten years were to pass before a complete statutory scheme of economic and safety regulation was provided for the airline industry by the Civil Aeronautics Act of 1938. However, by 1936, the airlines were transporting more than 1.3 million passengers over 500 million revenue passenger-miles and employing approximately 10,000 persons. This growth convinced Congress of the

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† A.B., Princeton University; LL.B., Harvard Law School. Partner, Mulholland, Hickey & Lyman, Toledo, Ohio and Washington, D.C.

<sup>1</sup> Federal Aviation Act §§ 1-242, 72 Stat. 737 (1958), as amended, 82 Stat. 867, 49 U.S.C. §§ 1301-1542 (1964).

<sup>2</sup> CIVIL AERONAUTICS BOARD, HANDBOOK OF AIRLINE STATISTICS (1961).

<sup>3</sup> Railway Labor Act §§ 1-208, 44 Stat. 577 (1926), as amended, 80 Stat. 208, 45 U.S.C. §§ 151-88 (1964).

<sup>4</sup> Interstate Commerce Act, Parts I-V, 24 Stat. 379 (1887), as amended, 80 Stat. 168, 49 U.S.C. §§ 1-27, 301-25, 901-23, 1001-22 & 1231-40 (1964).

need for regulation of the industry's labor relations. Therefore, on 10 April 1936, the Railway Labor Act was amended<sup>5</sup> to extend its provisions, with some exceptions, to every common carrier by air engaged in interstate or foreign commerce,<sup>6</sup> as well as to "every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service."<sup>7</sup> This legislation has provided the basic framework for the federal government's regulation of airline labor relations for the past 33 years. Both railroads and airlines are generally excluded from the provisions of the National Labor Relations Act, although such carriers may be subject to that statute<sup>8</sup> in areas outside of employer-employee relations. The Supreme Court drew the line of demarcation between the statutes in *Brotherhood of Teamsters v. New York, N.H. & H.R. Co.*, in the following manner:

The Act, in its definition of an "employer," expressly excludes anyone subject to the Railway Labor Act. 61 Stat. 137, 29 USC § 152(2). It is of course true that employer-employee relationships of railroads such as respondent are governed by the Railway Labor Act, which was passed before either the National Labor Relations Act or the Labor Management Relations Act. Neither of the latter Acts was intended to tread upon the ground covered by the Railway Labor Act. It is clear that neither railroads nor their employees may carry their grievances with one another to the N.L.R.B. for resolution. But it does not follow from this that a railroad is precluded from seeking the aid of the Board in circumstances unrelated to its employer-employee relations.<sup>9</sup>

Airlines in their labor relations are subject to the Norris-LaGuardia Act<sup>10</sup> which limits the use of injunctions in labor disputes. In addition, they are subject to unique requirements set forth in section 401 (1) of the original Civil Aeronautics Act of 1938,<sup>11</sup> as amended at the behest of airline pilots. Subsections (1) and (2) thereof provide that every air carrier shall maintain rates of compensation, maximum hours and other working conditions of pilots so as to conform to the 1934 decision number 83 of the old National Labor Board. These provisions, which placed a floor on pilot compensation and working conditions, practically speaking have long been a dead letter, but recently have been revived in connection with some air taxi operations. Subsection (4) provides that as a condition to holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board (CAB), air carriers must comply with the provisions of the Railway Labor Act. The CAB has held that this legislation illustrates

<sup>5</sup> Railway Labor Act §§ 201-08, 49 Stat. 1189 (1936), as amended, 80 Stat. 208, 45 U.S.C. §§ 181-88 (1964).

<sup>6</sup> The amendment also included carriers by air transporting mail for or under contract to the United States.

<sup>7</sup> Railway Labor Act § 201, 44 Stat. 577 (1926), as amended, 80 Stat. 208, 45 U.S.C. § 181 (1964).

<sup>8</sup> See *Local Union No. 25 of International Brotherhood of Teamsters v. New York, N.H. & H.R. Co.*, 350 U.S. 155 (1956); *NLRB v. Interior Enterprises, Inc.*, 298 F.2d 147 (9th Cir. 1961); *Bruno v. Northeast Airlines*, 229 F. Supp. 716 (D.C. Mass. 1964).

<sup>9</sup> 350 U.S. at 159.

<sup>10</sup> Norris-LaGuardia Act §§ 1-15, 47 Stat. 70, 29 U.S.C. §§ 101-15 (1964).

<sup>11</sup> Civil Aeronautics Act. ch. 601, § 401(1)(1) & (2), 52 Stat. 977 (1938).

the congressional intention that the Board in appropriate cases should be the forum to hear and determine complaints alleging violations of air carrier obligations under the Railway Labor Act.<sup>12</sup> Thus, airlines are subject to an administrative enforcement of the provisions of the Act not applicable to surface carriers subject to that statute. Airlines have also been subject to indirect CAB regulation of their labor relations in the determination of airmail subsidies. Such regulation results from the judicial requirement that the Board consider airline conduct of such relations in allowing losses from strikes.<sup>13</sup>

However, the basic *legislative* framework for airline labor relations is and has been the Railway Labor Act (RLA). As has been shown, the application of the RLA to the airline industry occurred when it was still an infant operation. By that time the railroad industry, for which the statute had originally been enacted, was in a declining condition particularly with respect to passenger operations. In 1926, the number of employees in that industry exceeded two million. Presently, that number is approximately 600,000. However, the Railway Labor Act, as applied to the airlines, has governed the labor relations of an ever expanding industry. The 10,000 airline employees to whom the statute was made applicable in 1936 have grown by 30 fold and now approximate 300,000. During the first year of operations under the Act only some 17 collective bargaining agreements, covering a small number of airline employees, were on file with the National Mediation Board (NMB). At the present time, more than 300 such agreements are on file with the Board covering a substantial portion of the employees in the airline industry. This large increase in the number of industry employees, including the increase in the number whose rates of pay, rules and working conditions are governed by collective bargaining agreements executed in accordance with the Railway Labor Act, has brought with it an increase: (1) In the number of "major" disputes concerning the making and revision of such agreements, (2) in the number of "minor" disputes concerning the interpretation and application of such agreements and (3) in the number of representation disputes concerning the proper representative of particular crafts or classes of a carrier's employees.

The growth of the industry has also been characterized by rapidly changing technology in all phases of operations, particularly in the size and speed of aircraft. When the RLA was applied to airlines in 1936, the standard commercial aircraft was the two engine DC-3 which seated approximately 21 passengers and operated at a speed of some 175 miles per hour. In the next 30 years, aircraft progressed in ever greater size and speed culminating in the "jumbo jet," scheduled for service before the end of this year, with a speed of 650 miles per hour and a maximum seating capacity approaching 500 passengers. Similar changes have occurred in

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<sup>12</sup> *Air Line Pilots v. Southern Airways*, 36 C.A.B. 430 (1962). These requirements were continued in the Federal Aviation Act, 72 Stat. 737 (1958), as amended, 82 Stat. 867, 49 U.S.C. §§ 1301-1542 (1964).

<sup>13</sup> *American Overseas Airlines v. CAB*, 254 F.2d 744 (D.C. Cir. 1958).

ground operation techniques, characterized by increasing use of computers and other devices. These changes have resulted in increased employee productivity, changes in job contents and skills, changes in airline needs and added complexity of airline labor problems.

These consequences were readily apparent in the mechanics strike which grounded five of the largest air carriers (Eastern, National, Northwest, TWA and United) during the summer of 1966. The air carriers involved relied heavily upon the 1962 guidelines promulgated by the President's Council of Economic Advisers which indicated that in the interest of economic stability, annual increases in man-hour wages should not exceed the national-trend productivity rate of 3.2 percent. However, beginning in 1961, productivity in the airline industry increased at a very rapid rate—far above the 3.2 percent per year in the general United States economy. The result was that for the period 1961 to 1965, the average rate of increase was approximately 11 percent per year.<sup>14</sup> Presidential Emergency Board No. 167, created pursuant to section 10 of the RLA,<sup>15</sup> in its report of 27 August 1966, commented upon the above-mentioned standard productivity trend in the airline industry:

### 3. *Airline Wage Rate Changes Not a Standard*

The experience of American Airlines is typical of the air transportation industry in that productivity has been increasing in the postwar period at a rate substantially above that of the rest of the economy. Historically, industries undergoing rapid technological change and productivity increase tend to experience (i) above average growth in job opportunities, (ii) an increase in wage levels above that of the average of the economy, and (iii) a fall in prices relative to the average. American Airlines, and the air transportation industry in general, appear to be experiencing these effects. As such, they are not to be considered as setting a standard for other industries or for the economy as a whole.<sup>16</sup>

Under these circumstances, it was not surprising that the machinists demanded an approximate annual wage increase of 6.4 percent, as estimated by the carriers over a three-year period and, consequently, that they were unwilling to accept the guideline as a wage limitation. A bitter and costly strike followed with eventual agreement at 4.8 or 5.2 percent, depending upon whose figures are accepted.

The changing requirements of the airlines, with parallel technological changes, were reflected in the crew complement issue. This issue was concerned with whether the third seat in the pilot compartment of jet aircraft should be occupied by a pilot-trained and oriented individual or a mechanic-trained and oriented employee. This dispute produced a special presidential study board, the Feinsinger Commission. It also produced a series of strikes; in fact, the airlines themselves insist that this issue has been the greatest cause of labor strife in the industry during the last decade.

<sup>14</sup> See Study of Planning, Programming, and Research Division of the Bureau of Economics of the Civil Aeronautics Board, *Trends of Productivity in the Airline Industry 1957-1965* (Oct. 1966) and Bureau of Labor Statistics Report No. 308 (Aug. 1966).

<sup>15</sup> Railway Labor Act § 10, 44 Stat. 577 (1926), as amended, 80 Stat. 208, 45 U.S.C. § 160 (1964).

<sup>16</sup> Report of Presidential Emergency Board No. 167 (27 Aug. 1966).

Similar issues with respect to navigators, as well as the number of pilots required for particular aircraft, have been arising as a consequence of technological changes.

Airline labor relations were so tranquil during their first year under the Act that the NMB gave the following optimistic report concerning the future:

The commercial airlines and their employees were made subject to the provisions of the Railway Labor Act in 1936 by amendments in the form of title II of the Act. The year just closed was the first full fiscal year during which title II was operative. The year witnessed a response to the provisions of the Act in that voluntary organization, particularly among the maintenance and radio employees of the airlines, came into being and initiated collective-bargaining conferences which culminated in the making of several agreements establishing rates of pay, hours, and working conditions for air line mechanics and radio operators. Despite their relatively extensive organization, the pilots of the air lines have not yet seen fit to enter into agreements with the air carriers further defining their standards of employment. No disputes over representation arose in the course of the year among the airline employees.

Such developments in labor relations as have taken place in the air transport industry thus far have proceeded in keeping with the letter and spirit of the Railway Labor Act. *Given a relatively new industry, not heretofore seriously troubled by misunderstandings between employees and managements, and subjecting it and its employees to a labor policy such as is at the bottom of the Railway Labor Act apparently makes for the amicable and constructive development of labor relations in such an industry* [Emphasis added.].<sup>17</sup>

Thirty years later, the Board was involved in 36 airline mediation cases or disputes serious enough to require its mediation services. These disputes resulted in strikes against seven airlines totaling 231 days. The most serious dispute was the machinist strike mentioned above which grounded 65 percent of the domestic airline operations for 43 days, and resulted in a loss to the carriers involved of approximately 103 million dollars.<sup>18</sup> The Board was also confronted with 42 representation disputes involving more than 15,000 airline employees. In addition, ten "minor" disputes erupted into strikes, in spite of the Act's compulsory arbitration features for the settlement of such disputes. These resulted in a number of injunction proceedings in federal courts against airline employee organizations.

Prior to the 1966 machinists strike there had been limited Congressional intervention in labor disputes under the RLA. In 1963, Congress enacted Public Law 88-108<sup>19</sup> providing for compulsory arbitration of two disputes between railroads and labor organizations representing railroad employees. The issues involved the use of firemen on locomotives and the "crew consist" issue which threatened a nation-wide rail strike. The 1966 airline strike again provoked Congressional discussion concerning legislation to

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<sup>17</sup> NATIONAL MEDIATION BOARD, THIRD ANNUAL REPORT 6 (30 June 1937).

<sup>18</sup> These figures are derived from a Civil Aeronautics Board study of the financial effects of the strike. The air carriers involved claimed a much bigger loss. Eastern, Northwest, Trans World and United submitted figures to the Board showing a loss exceeding 116 million dollars for just the four air carriers.

<sup>19</sup> 77 Stat. 132 (1963).

provide for compulsory settlement of that particular dispute as well as similar future disputes. In 1967 Congress once again intervened in a railroad labor dispute when it enacted Public Law 90-54<sup>20</sup> providing for "non-compulsory" arbitration of a dispute between six shopcraft unions and the nation's railroads involving wage increases and wage differentials for skilled shopcraft employees. A special board was provided whose determination was to have the same effect as one arrived at by agreement under the Railway Labor Act. Since that time there have been numerous proposals for new legislation to improve the conduct of labor relations under the RLA. Some of these proposals have not been confined to that statute alone, but have been directed to labor relations generally, particularly in those industries where disruptions have a substantial impact upon the public. The remainder of this study will examine labor relations in the airline industry over the past three decades, the problems which have arisen and proposals for additional legislation. This study will be directed toward the three major areas of statutory airline labor relations: (1) The making and maintaining of collective bargaining agreements, (2) the determination of employee grievances or disputes over the interpretation and application of collective bargaining agreements and (3) the determination of representation disputes.

## II. CONDUCT OF AIRLINE LABOR RELATIONS UNDER THE RAILWAY LABOR ACT—PROBLEMS AND NEW LEGISLATION

### A. *The Making And Maintenance Of Airline Collective Bargaining Agreements*

The basic purpose of the Railway Labor Act is to avoid interruptions to commerce or to the operations of carriers. To this end, the statute provides that it shall be the duty of all carriers and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes with respect thereto.<sup>21</sup> This statutory command, along with other provisions of the Act, recognizes collective bargaining as the basis for carrier labor relations, and accordingly, creates an enforceable obligation in the federal courts.<sup>22</sup> It is in essence a requirement of "good faith" bargaining by the parties.<sup>23</sup> The Supreme Court has stated that the major objective of the Railway Labor Act is the avoidance of industrial strife by conferences between representatives of the employer and the employee.<sup>24</sup> The Court further stated that:

The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and

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<sup>20</sup> 81 Stat. 122 (1967).

<sup>21</sup> Railway Labor Act § 2, 44 Stat. 544 (1926), as amended, 80 Stat. 208, 45 U.S.C. § 152.

<sup>22</sup> General Committee, *BLE v. M-K-T Co.*, 320 U.S. 323 (1943).

<sup>23</sup> *Brotherhood of Railway Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965).

<sup>24</sup> *Id.* at 658.

confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First.<sup>25</sup>

This requirement is buttressed by an elaborate procedural framework which is designed to settle collective bargaining disputes. The requirements provide for the service upon the other party, by either the representatives of the employees, the air carrier or both, of a 30-day written notice (the "section 6 notice") of proposed changes in collective bargaining agreements affecting rates of pay, rules or working conditions. The service of such notice brings into operation status quo provisions which prohibit any alteration in rates of pay, rules or working conditions until the dispute has been settled. In addition, such notice activates the entire bargaining procedure of the statute. These procedures contemplate: (1) An initial effort at negotiation and settlement by the parties; if these efforts fail, (2) an invocation of the services of the National Mediation Board to mediate the dispute; if mediation fails, (3) an effort by the Board to secure the agreement of the parties to a voluntary arbitration of the dispute; and finally, if the dispute is not settled by any of these means and threatens to substantially interrupt essential transportation services, (4) the appointment of a Presidential Emergency Board to engage in fact-finding and to report to the President thereon. Neither the employees nor a carrier can resort to self-help until these procedures are exhausted.<sup>26</sup> In *Manning v. American Airlines*, the court of appeals spelled out the provisions as applied to an airline:

The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the status quo while the parties to a labor dispute pursue various stages of negotiation, mediation, or arbitration, was established long ago. *Texas & N.O.R.R. v. Brotherhood of Ry. Clerks*, 281 U.S. 548, 565-566, 50 S. Ct. 88, 74 L. Ed. 608 (1930). Although the *Texas & N.O.* decision antedated the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made clear that it was not intended to apply to injunctions of this nature. See *Railroad Yardmasters v. Pennsylvania R.R.*, 224 F.2d 226 (3 Cir. 1955); *Chicago, R.I. & P.R.R. v. Switchmen's Union*, 292 F.2d 61, 63-64, 66 (2 Cir. 1961), cert. denied, 370 U.S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962).<sup>27</sup>

And, in concluding its opinion, the Court remarked:

The purpose of § 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted. . . .<sup>28</sup>

Once the statutory procedures are exhausted, either side may turn to self-help.<sup>29</sup> The Supreme Court has declared:

<sup>25</sup> *Id.*

<sup>26</sup> *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945); *Manning v. American Airlines, Inc.*, 329 F.2d 32 (2d Cir. 1964).

<sup>27</sup> 329 F.2d at 34.

<sup>28</sup> *Id.* at 35.

<sup>29</sup> *Brotherhood of Locomotive Eng'rs. v. B & O Co.*, 372 U.S. 284 (1963).



. . . [t]he parties are required to submit to the successive procedures designed to induce agreement. § 5, First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.

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There is, consequently, no question of bad faith or misconduct on the part of either party justifying the other side's unilateral imposition of changes in working rules. What is clear, rather, is that both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board.<sup>30</sup>

The framers of the statute hoped that the final resort to self-help would not be necessary. Rather they hoped the procedures would narrow the dispute, facilitate negotiations and focus the spotlight of public opinion on the participants and thus, aid settlement. The Act, therefore, is concerned with procedures, and not with substance. The Supreme Court pointed out this fact in the *BFO* case:

[t]he Railway Labor Act . . . does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest . . . is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. . . .<sup>31</sup>

These procedures have not been successful in settling airline labor disputes short of resort to strikes. Following the close of World War II, when airline operations began to expand, through 1968, there have been 93 airline strikes totaling 2308 days. This statistic averages out to approximately 4 strikes a year lasting 100 days. Two of these strikes lasted more than 200 days and five lasted more than 100 days. Approximately 50 percent of these strikes, or 43, exceeded ten days in length, while 57 continued for a week or more. Whether this record is considered good or bad depends upon one's point of view. Even in 1966 the National Mediation Board reported to Congress that "there have been periods of crises under the act, but in the aggregate the system has worked well—it has settled large numbers of disputes both at the local and national level with a minimum of disturbances to the public."<sup>32</sup> The Board has since made a similar report.

One can show statistically that strikes have occurred in only a relatively small percentage of contract negotiations. Thus, in a recent presentation to the Civil Aeronautics Board, seven of the larger trunk carriers, employing approximately two-thirds of the airline industry's employees, reported that strikes in which they had been involved had occurred in only about

<sup>30</sup> *Id.* at 290-91.

<sup>31</sup> *Id.* at 290.

<sup>32</sup> NATIONAL MEDIATION BOARD, THIRTY-SECOND ANNUAL REPORT at 9.

seven percent of their contract negotiations. However, these major airlines, as long ago as October, 1958, regarded the threat of strikes by their employees as sufficient cause to enter into a Mutual Aid Pact to provide each other with financial aid in the event of strikes covered by the agreement. The initial Pact, in which as many as ten trunk airlines have participated, was based on a windfall principle of payments by participants to struck Pact members of amounts derived from additional revenues received by the non-struck airline as the result of a strike. Subsequently, the Pact was amended to provide to struck participants sufficient supplemental payments to raise their receipts to 25 percent of normal air transport expenses. These arrangements have required CAB approval under section 412 of the Federal Aviation Act<sup>33</sup> which requires Board approval of cooperative working arrangements between air carriers. The Pact has been narrowly approved by the Board for limited periods with substantial differences of opinion as to its effects upon airline labor relations.<sup>34</sup> It is presently before the Board again for approval.

In support of a continued need for this Pact the participating air carriers argue that: (1) Airlines are particularly vulnerable to strikes because they are unable to recover revenues lost by strikes, and cannot eliminate a substantial portion of airline expenses; (2) the participating airlines have lost approximately 246 million dollars in airline strikes since 1958; and (3) airline unions have been promiscuous in the use of union strike power. The airline unions have opposed this agreement on the grounds that it has substantially contributed to the deterioration of labor relations in the airline industry during the past decade, and that it constitutes a direct attack on their bargaining integrity. In the Civil Aeronautics Board's consideration of the Pact there has been no disagreement that steadily deteriorating labor relations exist in the airline industry, although there have been differences of opinion as to the cause. The situation was summed up by the following statement of Member Minetti in the Civil Aeronautics Board's 1964 consideration of the Pact:

Despite the wide divergence of views on numerous matters in this proceeding, there is uniform agreement on one thing: Labor-management relations in the airline industry for many years have been marked by instability as reflected in disputes and work stoppages, and such relations have shown significant deterioration during the period the Pact has been in effect. That this is so is not only conceded by all the parties, but is also borne out by the record before us, which discloses an alarming increase in both the number and duration of the work stoppages since the creation of the Pact.

The majority does not dispute the fact, and I am sure that they share my deep concern over the state of labor-management relations and the inestimable harm the repeated disputes and paralyzing strikes can do to the public interest. However, the majority if I correctly understand its position, is of the view that since the Pact does not violate the Railway Labor Act and is not inconsistent with national labor policy which permits the carriers to use mutual assistance as an economic weapon in the collective bargaining process,

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<sup>33</sup> Federal Aviation Act § 412, 72 Stat. 737 (1958), as amended, 82 Stat. 867, 49 U.S.C. § 1382 (1964).

<sup>34</sup> Mutual Aid Pact Investigation, 40 C.A.B. 559 (1964).

the Board, absent convincing proof that the Pact has been a causative factor in producing the labor unrest which has affected the air transport industry in the last few years or will produce such unrest in the future, either cannot or should not find the Pact adverse to the public interest.<sup>35</sup>

Since that time 15 strikes have occurred in the airline industry lasting a total of 433 days. This situation, along with threatened major strikes in the railroad industry, have led to proposals to amend the Act to provide for some form of compulsory settlement of collective bargaining disputes.

A typical approach to the problem is S. 79 introduced in the 90th Congress to establish a system of compulsory arbitration to deal with air transport labor disputes which result, or threaten to result, in a substantial interruption to commerce. The arbitration would be carried out by a board of three men composed of one member designated by the President and two designated by the parties. This board would establish rates of pay and conditions of employment which are fair and equitable to the parties. Its awards would be binding and effective for one year unless changed with the consent of the parties. The award would be subject to judicial review based upon the usual standards of review of arbitration awards; however, a claim that the award is unreasonable and not supported by the evidence would be included. The award would be enforced by injunctive relief and criminal penalties. Another approach aimed at compulsion is H.R. 5638, also introduced in the 90th Congress. It would amend the provisions concerning RLA presidential emergency boards. Under this proposal, the President could: (1) Transmit an Emergency Board Report to Congress for such action as it deems appropriate, (2) for a period up to 120 days put into effect working conditions recommended by the Board, (3) notify the parties of an intention to appoint a special board to settle the dispute or (4) do all of the above. The special board, also composed of three members either designated by mutual agreement or appointed by the President, would be directed to make a just and reasonable determination, taking into account all relevant circumstances including a carrier's ability to pay, and the public interest in a safe, adequate, economical and efficient transportation system, as well as in price stability and prevention of inflation. The board's decision would be binding for up to two years and subject to limited court review.

Various other types of compulsory machinery have been proposed, including labor courts. In addition, there are proposals before Congress to outlaw strikes in one segment of the transportation industry (air, water, railroad, motor vehicle, pipeline) in support of employees in another segment, and to prohibit various combinations of unions, including locals within the same international union, from taking collective action, applying the anti-trust laws to labor unions, eliminating membership ratification of agreements and requiring membership votes on continuing strikes after the lapse of a stated period.

All of these proposals reflect concern with strike action as a means of

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<sup>35</sup> *Id.* at 565-66.

settling collective bargaining disputes under the RLA. These proposals are unlikely to receive any support from airline labor unions. Moreover, those unions which also represent railroad labor have already expressed opposition. These organizations traditionally believe the right to strike is a necessary ingredient of the collective bargaining process; they believe that the creation of any governmental institution with power as that proposed above is incompatible with the free enterprise system and with democracy itself; they believe that to invest any institution with power to determine wages and conditions of employment is less justifiable than the determination of prices, and is totalitarian in nature; and they also believe that such problems are not solved by judicial tribunals due to the lack of adequate standards to govern judgments. There is also an unspoken union feeling that regardless of attempted fairness in the selection of such boards, they might be business oriented or operate within a business oriented set of standards.

No form of compulsory settlement of bargaining disputes has been tried in the airline industry, although there has been voluntary arbitration of such disputes from time to time. In recent years, on two occasions previously mentioned, there has been special legislation to deal with railroad labor disputes. However, in both of these situations, because of industry-wide bargaining, the disputes threatened to shut down nearly all of the rail transport system, thereby threatening a public crisis in transportation. Such a situation has not occurred in the airline industry; even in the 1966 machinists strike two major air carriers, several regional trunk air carriers, the entire local air service industry and Pan American were not involved. In addition, the Secretary of Labor in the new Administration has recently expressed his personal opposition to attempted compulsory settlement of labor disputes.

There are also practical objections to attempted compulsory settlement of collective bargaining disputes. The provisions for compulsory settlement of "minor" disputes involving employee grievances or disputes concerning the interpretation and application of agreements, have not been an unqualified success in preventing strikes in the airline industry. In the last ten years, there have been approximately 100 airline strikes of sufficient impact to bring about carrier resort to the federal courts for injunctive relief. Attempted compulsory arbitration also means the death of collective bargaining. Experience with the present makeup of emergency boards indicates an increasing inclination by parties not to engage in genuine negotiations prior to the convening of such boards. One of the results has been the creation of 171 emergency boards during the 34 years that the NMB has been in existence. Under a system of compulsory settlement of collective bargaining disputes, all major disputes would, therefore, in the absence of some established incentive or penalty, tend to come before boards for settlement rather than an occasional dispute. Time, money, effort and resulting rigidities militate against the desirability of such a result. Moreover, experience with compulsory arbitration laws in the public utility

and public employee field does not commend them as a solution to collective bargaining disputes. This experience suggests that the application of force merely produces an escalation on the other side requiring nothing short of a strike to settle the dispute.

If compulsory settlement of collective bargaining disputes is not an answer to labor problems of the airline industry, are there any better alternatives? Can anything be done to improve the bargaining process in order to cut down on the incidence of trial by battle? The task is not an easy one. As the NMB observed in its most recent report to Congress, "procedures in themselves do not guarantee mechanical simplicity in disposing of industrial disputes, which the Supreme Court of the United States has aptly described as 'a subject highly charged with emotion'. Good faith efforts of the parties and a will to solve their own problems are essential ingredients to the maintenance of peaceful relations and uninterrupted service."<sup>36</sup> Yet, knowledge of the essential ingredients does not bring the process to life. Not only is the subject highly charged with emotion, but there are other practical obstructions. On the union side, contrary to popular assumptions, there are generally no "union bosses" who can tell the rank and file what to do. Union leaders are politicians answerable to a constituency and similar to members of Congress, they are not always free to be practicing statesmen. Moreover, as experience has shown, the ultimate in responsibility or wisdom does not reside in the ranks of the membership as a whole, so that "grass roots democracy" does not provide an answer, as the authors of Landrum-Griffin are learning. Indeed, there are now proposals to eliminate membership ratification of collective bargaining agreements. On the management side, those engaged in the conduct of labor relations also are not free agents. They too, are " beholden" to constituents in the form of higher officers, boards of directors, stockholders and the all-pervading sword of economics which dictates as low costs as are possible. They are also subject to the human motivation of Parkinson's well-known law which operates in private organizations, as well as in government. If these factors were not discouraging enough, there is the additional "Peter principle"—that every individual tends to ultimately rise to the level of his own incompetence, an applicable law in the conduct of labor relations as well as other endeavors. Therefore, collective bargaining, like every other human institution, is subject to human failings. Yet this statement does not mean that steps may not be taken to improve the process even if perfection may never be attained.

The key to improved collective bargaining under the RLA is a strong and effective National Mediation Board. Its central role of mediation can either hinder or help successful bargaining. Since the NMB has presided over labor relations in a railroad industry with some two million employees constituting a major economic force, the decline in its prestige and stature has been steady. Membership on the Board is no longer attractive to persons with the universally recognized stature in labor relations of a William

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<sup>36</sup> NATIONAL MEDIATION BOARD, THIRTY-FOURTH ANNUAL REPORT 9.

M. Leiserson or a Frank P. Douglass, past chairmen of the Board. On some occasions, appointments to the Board have dipped far down the political scales. Consequently, the Board lacks the prestige and respect to fulfill an effective role in the bargaining process. Moreover, important disputes are under the supervision of individual Board members who are political appointees. Thus, there can be no guarantee that such individuals will possess the necessary expertise to engage in the sensitive art of labor mediation. Further, in critical situations the Department of Labor intervenes, and the Board is relegated to the shadows of obscurity. In recent years, as a consequence of all these factors, there has been among both unions and management, a noticeable decline in respect for the Board as an institution, and there has been increasing criticism of the manner in which it fulfills its functions.

This problem is not an easy one with which to deal. One possible approach would be a joint carrier-union effort to upgrade the Board in terms of prestige. This task would mean an increased budget and a greater attractiveness in terms of ultimate responsibility. If this approach is not politically feasible, then other approaches must be found. One such approach would be to place the Board in the Department of Labor with the Secretary of Labor directly responsible for its operations. Another would be complete abolition of the Board (which some unions now favor) with the transfer of its mediation functions to the Federal Mediation and Conciliation Service, and the transfer of its other functions to either the Department of Labor or the National Labor Relations Board. In any event, some action with respect to the Board is required as a prime requisite to any substantial improvement in collective bargaining under the Act.

It has also been suggested that the airline industry should be removed from coverage under the RLA and placed under the National Labor Relations Act where it would be subject to the National Relations Board, and the concept of "unfair labor practices" as developed under that statute. There is, however, no guarantee that this approach would improve collective bargaining. It would, of course, eliminate the existing concept of a continuing contract and bring about a much quicker confrontation of opposing forces. While this confrontation might have the effect of putting pressure on the parties for more effective bargaining, if such bargaining failed, it would produce quicker strikes contrary to the public interest in uninterrupted transportation services. On balance, it would appear more advantageous to improve the operation of existing RLA procedures.

The shortage of trained mediators also means delay in the mediation process. This delay, which has been a cause of discontentment, shortens tempers when mediation is ultimately undertaken and lessens its effectiveness. This problem has already caused one airline union to demand a Congressional investigation of the Board. One method of solving the problem would be to place practical time limits on mediation that could be extended by mutual consent. To the extent that it is a budgetary and personnel problem, it could be remedied without statutory amend-

ments. The air carriers through the Air Transport Association have recommended to the Board that there be greater flexibility in selection of mediators, including use of labor experts that are not members of the Board's staff.

Genuine collective bargaining needs to be restored by relying less on presidential emergency boards. Such boards were intended to deal with only those disputes which genuinely threatened a substantial disruption of commerce. Their extension to less important disputes in terms of the public interest lowers their stature and tends to provide an incentive to avoid genuine bargaining pending a hearing before such a board. The chances for settlement of the dispute by self-help are thus increased.

Some recently proposed legislation has been directed at the elimination of membership ratification of agreements negotiated by union representatives. The NMB cited this as a major problem of mediation in its Thirty-Third Annual Report:

In other instances mediation proceeds for only a short time before it becomes apparent that the designated representative of one or both sides lacks the authority to negotiate the dispute to a conclusion. Mediation cannot proceed in an orderly fashion if the designated representatives do not have the authority to finally decide issues as the dispute is handled. The Board has a reasonable right to expect that the representatives designated by the parties to negotiate through the mediator will have full authority to execute an agreement when one is reached through mediatory efforts.

Another facet of this problem is the requirement that an agreement which has been negotiated by the designated representatives must be ratified by the membership of the organization. Failure of the employees, in some instances, to ratify the action of their designated representatives cast a doubt on the authority of these leaders and a question as to the extent to which they can negotiate settlement of disputes. In time this situation may have far reaching effects unless corrected for it is basic that negotiators must speak with authority which can be respected if agreements are to be concluded.

The Board deplores the failure of the parties to cloak their representatives with sufficient authority to conduct negotiations to a conclusion. The general duties of the act stipulate that all disputes between a carrier or carriers and its or their employees shall be considered and, if possible, decided with expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.<sup>37</sup>

Attention was focused on this problem by the 1966 machinists strike when the membership turned down, by a three to one margin, an agreement negotiated after a lengthy strike. Such ratification by union membership or by management is not illegal under the existing statute.<sup>38</sup> However, it does make bargaining more difficult since it leaves the ultimate decision to individuals who may not be in possession of all the facts, and whose viewpoint is inevitably more narrow than their representatives. Airline union support or opposition for a statutory revision eliminating membership ratification would be split as there is no uniformity of union practice in

<sup>37</sup> NATIONAL MEDIATION BOARD, THIRTY-THIRD ANNUAL REPORT 37.

<sup>38</sup> *Chicago, Rock Island & Pac. R. Co. v. Switchmen's Union*, 292 F.2d 61 (2d Cir.), cert. denied, 370 U.S. 936 (1962).

this regard. There would be strong opposition from the members of those unions which follow membership ratification, particularly in view of the strong emphasis on the need for union democracy.

Interestingly, proposals have been submitted to Congress to require a continued-strike ballot at some point during the course of the strike, for example, after a period of 30 days. Such proposals, of course, are based on the assumption that employees, contrary to the wishes of the union leaders, may not want to continue the strike. The experience under the RLA, and particularly the 1966 experience of the machinists strike, would indicate otherwise.

Action of a non-legislative nature is also necessary to alleviate the misunderstandings and mistrust which contribute to the problems of air transport labor relations. These misunderstandings arise primarily during the period between negotiations, thus making ultimate settlement of differences difficult and often impossible. One avenue for alleviating this situation would be the establishment, by mutual consent of air carriers and airline unions, of joint management-labor conferences to review and discuss, periodically, problems of labor relations. While such a program would not mechanically guarantee the success of collective bargaining, it would likely improve the present situation.

#### *B. The Determination Of Grievances And Of Disputes Relating To The Interpretation And Application Of Agreements*

In 1934, the Railway Labor Act was amended by the addition of section 3 which provided a final and binding method of determining employee grievances and settling disputes relating to the interpretation and application of collective bargaining agreements. The statute was designed to accomplish this purpose by the establishment of a National Railroad Adjustment Board to which unadjusted disputes on the property could be submitted by either side for final determination. The original statute permitted *de novo* review of adjustment board awards adverse to carriers, but no judicial review of awards adverse to employees. In 1966, the statute was amended by Public Law 89-456 which made adjustment board determinations final and binding on both parties with only the limited judicial review for both parties that is provided generally for arbitration decisions. The Supreme Court has interpreted these statutory provisions as establishing a system of compulsory arbitration for such disputes.<sup>39</sup>

When the Railway Labor Act was amended in 1936 to extend the statute to the airline industry, similar procedures were established for the determination of disputes related to interpretation and application of collective bargaining agreements.<sup>40</sup> The major exception was that instead of providing for the immediate establishment of a National Air Transport Adjustment Board, airline and employee representatives were required to establish system boards to handle such disputes. The decisions of such sys-

<sup>39</sup> *Brotherhood of Railroad Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30 (1957).

<sup>40</sup> Railway Labor Act §§ 204 & 205, 44 Stat. 544 (1926), as amended, 80 Stat. 208, 45 U.S.C. §§ 184 and 185 (1964).



tem boards are enforceable in federal courts.<sup>41</sup> The establishment of a National Board was left to the National Mediation Board whenever it decided that such board was necessary; however, a National Board has never been established. Thus, the statutory scheme for the settlement of airline disputes of this type is, with the exception of a national adjustment board, essentially the same as that provided for railroads.<sup>42</sup>

In spite of the compulsory nature of these procedures, which is unique in the regulation of labor relations by the federal government, they have not been successful in the elimination of labor strife in this area. Over the last ten years there have been scores of strikes growing out of employee grievances or disputes covered by compulsory arbitration procedures, which have continued for a sufficiently lengthy time to bring about carrier judicial injunctive proceedings to stop or prevent such strikes. These strikes would clearly indicate a serious defect in the procedures. The basic problem appears to be the lack of assurance of a speedy determination of the grievances. It is evident that the grievance procedures need to be greatly accelerated in order to accomplish the purposes of compulsory arbitration. This could be done by mutual agreement of the parties or, barring such mutual agreement, by an amendment to the statute establishing strict time limits for each step in the procedure. Currently there is a substantial loss of time between a consideration of these disputes by system boards without a neutral referee, and the subsequent consideration by a neutral referee. Since most of the disputes of any consequence ultimately go to a neutral referee, the assurance of a speedy and impartial decision would be improved by an initial submission of the dispute to such a referee.

In addition, improvement of the strike situation requires action to maintain the status quo while the dispute is being settled. This can presently be accomplished only if a union strikes or threatens to strike, thus forcing the carrier to seek injunctive relief. Then, the union can ask for a status quo condition to the carrier-sought injunction.<sup>43</sup> This procedure is cumbersome and is an unsatisfactory way of dealing with the problem. What is needed is a status quo provision similar to that for collective bargaining. This problem is related to the necessity for speedier procedures, since a status quo cannot be maintained indefinitely. However, the existence of such a status quo provision through legislation would eliminate most of the strikes in this area.

### *C. Determination Of Representation Disputes*

The 1936 amendments to the Railway Labor Act applied section 2, Ninth to the airline industry, thus committing to the National Mediation Board the function of investigating and resolving representation disputes between the parties. The statutory requirements are based upon the assumption of a need for a speedy determination of such disputes, and to this end provide that the Board shall investigate and determine the dispute

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<sup>41</sup> *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

<sup>42</sup> *Bower v. Eastern Airlines*, 214 F.2d 623 (3d Cir. 1954).

<sup>43</sup> *Brotherhood of Locomotive Eng'rs v. M-K-T R.R. Co.*, 363 U.S. 528 (1960).

within 30 days after its services have been invoked. This requirement has been consistently honored in the breach. It is undoubtedly unrealistic as related to any "major" dispute, and is regarded by the courts as directory rather than mandatory.<sup>44</sup> However, it is also true that the average length of time involved in the settlement of "major" disputes defeats the statutory purpose. The basic problem is that the NMB is not equipped to handle this problem, for its primary function is mediation. The function of determining representation disputes is primarily adjudicatory, and the procedures of mediation are not applicable to handling an adjudicatory function.

The problems inherent in this conflict become clear when one compares the NMB's handling of such matters with the procedures of the National Labor Relations Board. The latter has a set of well-established, clearly defined rules to provide orderly and business-like procedures for this type of dispute. The NMB, however, has practically no rules in this area. Those that do exist are established primarily on an ad hoc basis as each dispute arises. Moreover, the Board has shown a great reluctance to exercise even the simplest of adjudicatory functions, and tries to persuade the parties themselves to agree upon almost everything involved in the dispute—this is an impossibility. The Board's approach to its representation functions was recently referred to by the Court of Appeals for the District of Columbia as a disquieting Alphonse-Gaston interplay.

The National Mediation Board badly needs to be reorganized and re-oriented with respect to its representation functions. It should adopt comprehensive rules for the orderly processing of representation disputes, and should establish a separate section of its staff to handle such cases in accordance with those rules. This function may require more staff than the Board has presently, but the advantages to the industry and public from such a change would be substantial. Air carriers through the Air Transport Association have recommended that the Board adopt definitive rules in this area, particularly where the representation dispute arises from a merger or acquisition.

In addition, the Act, as it is presently interpreted and applied by the NMB, does not give carriers any legal standing in representation cases, the theory being that the carrier has no proper interest in the matter. This procedure would appear to be a mistake. While a carrier should not be permitted to delay the progress of a representation dispute by formal adjudicatory hearings, it should have standing to be heard upon such issues as the definition of craft or class, and other matters which directly affect its interest and operations. While a change to accomplish this purpose *might* require statutory amendment, it is not at all clear that this requirement is necessary.

Finally, the statute should be amended to provide judicial review of the Board's exercise of its functions in representation cases. As the law presently exists, such review can be invoked only in cases involving "instances

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<sup>44</sup> System Federation No. 40 v. Virginian Ry. Co., 11 F. Supp. 621 (E.D. Va. 1935), *aff'd*, 300 U.S. 515 (1936).

of constitutional dimension or gross violation of the statute."<sup>45</sup> It is doubtful that such unbridled power should ever be conferred upon any federal agency, especially an agency such as the Board, with ever increasing responsibility for the stability of the airline industry. While the Board must have discretion in the exercise of representation functions, there should also be a measure of judicial restraint to keep that exercise within bounds of reason. The National Labor Relations Board is largely free of judicial review in representation matters; however, unlike the National Mediation Board, it has adopted precise and orderly rules which restrain its own actions.

### III. CONCLUSION

A review of the essential elements of air transport labor relations under the RLA during the more than three decades that the Act has been applicable to the industry clearly indicates that the basic aims of the statute have not been met with increasing frequency. It does not, however, follow from this statement that the application of the statute to the airline industry was in error. The problems which have arisen are essentially problems of administration of the statute and many of them could be alleviated by more effective administration. However, some of the defects which have been revealed are inherent in the statute in its present form. These can be cured only through new legislation.

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<sup>45</sup> *National Mediation Board v. Brotherhood of Railway & Airline Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968).